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Supreme Court, U.S.
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NO. 01-903

In The
Supreme Court of The United States

PATRICIA A. WESTON, on behalf of herself and all others similarly situated,

Petitioner,

v.

AMERIBANK, a State Savings Bank,

Respondent.

Petition for a Writ of Certiorari From The United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The core of Respondent AmeriBank's opposition to the Dressel's Petition is the alleged "distinction" between this case and Cullen v. Margiotta, 811 F.2d 698 (2nd Cir. 1987) growing out of the Sixth Circuit's observation that "the Dressels did not assert a TILA claim and the Dressels could not have made a TILA claim." Pet. App. A-7. Respondent's arguments (presented here in reverse order for reasons that shall become apparent) are (a) that the Sixth Circuit's determination that Weston's claims were time-barred is consistent with this Court's Opinions in American Pipe and Construction Co. v. Utah, 414 US 538 (1974) and Crown Cork & Seal v. Parker, 462 US 345 (1983) and (b) that the time bar applicable to the Dressels' TILA claim creates a

distinction between this case and the Second Circuit's decision in Cullen.

In fact, American Pipe and Crown Cork are clear that a putative class member has no duty to assert claims during the pendency of an original class suit under any circumstances, and cannot be accused of sleeping on her rights. As such, the "fact" that the Dressels' TILA claim was time-barred does not render the Sixth Circuit's decision consistent with American Pipe and Crown Cork, and by the same token will not support a "distinction" between this case and Cullen, thus the conflict between the Sixth and Second Circuits remains.

I.
CROWN CORK AND AMERICAN PIPE ESTABLISH THAT PUTATIVE CLASS MEMBERS HAVE NO INVESTIGATORY DUTY AND CANNOT BE DEEMED TO HAVE SLEPT ON THEIR RIGHTS

Respondent's Brief states that a class member such as Weston had a duty to determine whether the Dressels had asserted or could assert a Truth in Lending claim, failing which she "slept on her rights." Res. Brf. p. 15.[1] American Pipe and Crown Cork establish this is not the case:

> Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it . . . .

American Pipe, 414 U.S. at 551.

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[1] Respondent suggests the Dressels never asserted a TILA claim and could not assert a TILA claim because of the time bar. Both suggestions are wrong. The Dressels, in fact, sought to amend their complaint to assert a TILA claim, whereupon AmeriBank asserted the affirmative defense of limitations. Had the affirmative defense not been asserted, it would have been waived. Fed. R. Civ. P. 8(c); Senter v. General Motors, 532 F. 2d 511, 530 (6th Cir. 1976)

> [C]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights.

Crown Cork, 462 U.S. at 352. Weston had no duty to investigate the scope of the Dressels' claims.[2]

II.
BECAUSE THERE IS NO MEANINGFUL DISTINCTION BETWEEN THIS CASE AND CULLEN, THERE IS A CONFLICT BETWEEN THE SECOND AND SIXTH CIRCUITS

Because Weston had no duty to do anything to protect her rights in light of the unambiguous language of American Pipe and Crown Cork & Seal, the fact that the Dressels had not asserted a TILA claim cannot form the basis for distinguishing this case from Cullen. Here, as in Cullen, the issue properly before the lower courts was exactly what Respondent itself says it was in Cullen: whether

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[2] Perhaps in recognition of this, Respondent suggests Weston had **actual** knowledge of the Dressels' claims because she has the same attorney. This would only be true if undersigned counsel represented Weston individually before dismissal of Dressel.

second action was sufficiently related to the first to warrant invocation of American Pipe. Res. Brf. p. 11.

Respondent's other effort to distinguish Cullen is based upon the district court's initial ruling that Weston's claim, although not time barred, was subject to *res judicata* because of the actual adjudication and dismissal of Dressel.[3] This is plainly wrong on either of two fronts. First, Dressel was not finally adjudicated, and, as pointed out in Weston's initial brief, the initial dismissal was reversed and the case reinstated. Dressel v. AmeriBank, 247 Mich App 133, 635 NW 2d. 328 (2001), Appendix C to Weston's petition. Further, no class notice ever went out in Dressel, and as American Pipe makes clear, until a class member receives a class notice and an

[3] The district court's *sua sponte* ruling in this regard has never been defended by AmeriBank before, and was ignored by the Sixth Circuit.

opportunity to opt in or out of the class, she cannot be bound by the initial class suit.

III.
CONCLUSION

Respondent's Brief serves only to underline the error in the Sixth Circuit's opinions.

Respectfully submitted,

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